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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 14

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD EDUCATION SOCIETY *ET AL.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 486–492) is reported in 86 F. (2d) 692.

JURISDICTION

The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Are false representations to prospective purchasers of a ten-volume reference work and a loose-

leaf extension service, that the reference work is free and that only the extension service is to be paid for, an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act?[1]

2. Should the individual respondents Stanford, Ward, and Greener be bound individually by each of the paragraphs of the Commission's order?

3. Should the seventh paragraph of the Commission's order have been modified so as to permit respondents to make false representations that contributors to Aiton's Encyclopedia whose contributions were *not* taken over into the current Standard Encyclopedia were contributors to the latter?

4. Was the eighth paragraph of the Commission's order, prohibiting respondents from advertising that any person had given testimonials or recommendations for respondents' publication when such is not the fact, supported by evidence?

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, approved September 26, 1914, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), is printed in the Appendix, *infra*, pages 84 to 87.

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[1] This question was the basis for the petition for certiorari. Questions 2 to 4 were raised and saved by the assignment of errors.

STATEMENT

The respondents herein are Standard Education Society, a Minnesota corporation (R. 8); Standard Encyclopedia Corporation, an Illinois corporation (R. 27); and the following individuals: H. M. Stanford, president, director, and general manager of Standard Education Society (R. 12, 379, 412); W. H. Ward, vice-president, secretary, sales manager, and director of Standard Education Society (R. 30, 383, 424); and A. J. Greener, comptroller and auditor and generally in charge of financial activities of Standard Education Society (R. 467). Stanford, Ward, and Greener were the sole stockholders in the Standard Education Society, Stanford and Ward each owning 250½ shares and Greener 35 shares (R. 426–427). Stanford, Ward, and Greener are also the sole incorporators and original directors [2] of Standard Encyclopedia Corporation (R. 30, 32, 423–424, 427). The respondent corporations are engaged in the compilation and publication of encyclopedias and a loose-leaf extension service in connection therewith and the sale thereof in interstate commerce throughout the United States (R. 8, 27). The respondent Standard Education Society is also engaged in the sale of a course of home study and instruction which it offers under the name of Standard Extension University (R. 5, 10, 199–201, 204–210, 463, 546).

[2] Greener was a director of the Standard Encyclopedia Corporation when it was formed, but he resigned shortly thereafter (R. 427).

On February 25, 1929, the Federal Trade Commission issued a complaint against Standard Education Society and the respondent H. M. Stanford, individually and as president thereof, alleging the use of unfair methods of competition in interstate commerce, in violation of Section 5 of the Federal Trade Commission Act, in connection with the sale of encyclopedias and a correspondence course of home study and instruction (R. 2–7). The said respondents answered (R. 8–11, 12–13) and hearings were held before an examiner (R. 81–414).

Thereafter, on December 4, 1929, the Commission issued a supplemental complaint, naming as respondents Standard Education Society, Standard Encyclopedia Corporation, H. M. Stanford, W. H. Ward, and A. J. Greener (R. 20–26). The supplemental complaint alleged that subsequent to the issuance of the original complaint the respondents Stanford, Ward, and Greener had organized, under the laws of the State of Illinois, a corporation known as Standard Encyclopedia Corporation, that Standard Education Society had ceased publishing encyclopedias and reference works and that this business had been taken over by Standard Encyclopedia Corporation, which was engaged in compiling and publishing the encyclopedias and works formerly published by Standard Education Society and was selling and distributing them in interstate commerce. The supplemental complaint further alleged that Standard Encyclopedia Corporation and the individual respondents, individ-

ually and as directors of Standard Encyclopedia Corporation, were using substantially the same methods of unfair competition alleged in the original complaint to have been used by Standard Education Society.

On January 6, 1930, the respondents, Standard Encyclopedia Corporation, W. H. Ward, and A. J. Greener, answered the supplemental complaint (R. 27–31). On January 23, 1930, an amended answer was filed by Greener (R. 32–33). Testimony and other evidence in support of charges in the supplemental complaint and in opposition thereto was presented by the parties before an examiner (R. 416–470). It was stipulated that in determining the issues raised by the supplemental complaint and the answers thereto the Commission might consider the evidence introduced at the hearing on the original complaint (R. 34–35).

A final hearing was held before the Commission, and on December 24, 1931, the Commission made and entered findings of fact and its conclusion based thereon (R. 65–77).

The facts disclosed by the record and found by the Commission may be summarized as follows: "In 1900 there was incorporated under the name Welles Bros. Publishing Company a corporation which published and distributed a work under the name and style of Aiton's Encyclopedia. About the year 1912 the name of the work was changed to Standard Reference Work. In the year 1917 the name of the corporation, Welles Bros. Pub-

lishing Company, was changed to Standard Education Society, and under this latter name and style continued to publish, sell, and distribute in interstate commerce the books styled Standard Reference Work" (Fdg. 6, R. 67).

The officers, directors, and shareholders of the Standard Education Society and the persons in complete charge of all its operations were Stanford, Ward, and Greener (see page 3, *supra*; page 64, *infra*). In August 1929 (while the hearings before the Commission were being held), Stanford, Ward, and Greener caused a new corporation, the Standard Encyclopedia Corporation, to be organized, and since that time the publication distributed by respondents has been named the New Standard Encyclopedia and the work has been distributed by and in the name of the new corporation [3] (R. 67–68, 398, 404–406).

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[3] The Standard Education Society continued to "handle * * * everything of a financial character," but did not print any more books (R. 405). Eventually the two companies were to be merged (R. 406). Paragraph 20 of the Commission's findings (R. 76) reads in part as follows:

> Respondent Standard Encyclopedia Corporation was organized by the individual respondents herein in August 1929, approximately six months after the issuance of the original complaint herein by the Federal Trade Commission. The Commission concludes and infers from the record in this case and so finds that this corporation was organized by the individual respondents for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent Standard Education Society.

From 1912 to 1929 the publication sold by the Standard Education Society was known as the Standard Reference Work (Fdg. 6, R. 67–68, 387, 392). It was revised and generally expanded every two or three years, a thorough revision being made in 1923 (R. 387–388). In 1929 when the new corporation was formed and the name of the publication changed to New Standard Encyclopedia, the last previous edition was revised and two volumes of special teachers' material eliminated (R. 404–405). Both of these works consist of ten volumes, which are accompanied, when delivered to purchasers, by a loose-leaf binder (Fdg. 10, R. 69, 405). The corporate respondents also publish and sell a so-called extension service which consists of loose-leaf material for inclusion in the binder (R. 8, Fdg. 10, R. 69), this material being represented as designed to keep the encyclopedia up to date. The usual price for either the Standard Reference Work or the New Standard Encyclopedia and the extension service for ten years is and has been $69.50 (Fdg. 10, R. 69, 384). Sometimes sets of works of fiction are included, and in that event the price is $89.00 (Fdg. 10, R. 69, 385).

The respondent corporations are engaged in interstate commerce; the books they publish are sold by salesmen to persons throughout the country; and the books are shipped in interstate commerce to the purchasers after the contracts of sale have been made (Fdgs. 9–11, R. 68–69, 8, 27, 384). The

respondents compete in interstate commerce with other persons and firms selling similar sets of encyclopedias or reference works in interstate commerce (Fdg. 9, R. 68).[4] There was testimony that at least one of such competitors does not engage in any of the unfair practices engaged in by respondents (Fdg. 9, R. 68, 163–165). The practices are described immediately below.

The customary method by which respondents sell their publications is by false representations to a prospective customer that he has been specially selected to receive free of charge a set of the ten-volume reference work or encyclopedia (Fdgs. 12–13, R. 69–72). The prospective purchaser is told that he is one of a few individuals in his locality selected to receive the books free, and that the company regards the cost of the gift as a legitimate advertising expense to be compensated by the use of the customer as a reference and in some cases by a written recommendation from him (*Ibid;* R. 89, 91, 104, 111, 122, 125, 133, 135, 141, 143, 145, 153, 159, 168, 174, 176, 179, 183, 184, 188–189, 193, 194, 227–228, 233, 255, 256, 268–269, 274, 280, 287, 291, 292, 295, 297, 299–301, 307–309, 311–312, 318–319, 324, 327, 331, 349, 352, 355, 356, 365, 171–175; Ex. 10, 14, 17, 24, 27, 35, 40, 43, 48, 80).[5] In many instances these representations are first

[4] See page 61, *infra.*

[5] Unless otherwise noted, all exhibits referred to are "Commission's exhibits."

made by letters sent from the office of respondents* (Exs. 10, 14, 17, 24, 27, 35, 40, 43, 48, 117) and then by selling agents who make the same representations. In other cases the first approach to the customer is made by the agent (R. 82, 89, 91, 100, 104, 111, 116, 119, 122, 176, 281, 299, 324).

The agent subsequently informs the prospective purchaser that the encyclopedia is kept up to date and its value greatly enhanced by the loose-leaf extension service (*cf.* Resp. Ex. 6), and that if the customer subscribes to the service, he will be given the encyclopedia free of charge (R. 168, 193, 195–196, 259, 307, 376). By direct statement (Ex.

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*Most of these letters were sent on the letterhead of Charles A. Knapp and signed by Knapp as "Publicity Manager" (*e. g.* Ex. 10). Respondents attempted to show that Knapp was not their agent or employee but an independent contractor, and that they were not responsible for his activity (R. 48, 429–430, 435–436). Inasmuch as there is a great deal of other evidence to support the Commission's findings as to the misrepresentations made in Knapp's letters, Knapp's status is not of vital importance at this stage of the case (see letter at R. 271 and Ex. 80 for similar representations made by persons acknowledged to be in respondents' main office).

The following facts demonstrate, however, that, whether or not Knapp was an employee of respondents, they permitted him to represent himself as such to the public and were jointly responsible with him for any misrepresentations made by him or his agents in selling their encyclopedia: (1) until the week before the final hearing his offices adjoined those of respondents (R. 435); (2) his letters were signed "Publicity Manager" (Ex. 10); (3) letters sent by *his* employees were sent on the letterhead of the Standard Education Society and signed "Manager, Publicity

35, 48) or necessary inference, the customer is intentionally led to believe that he is paying only the usual price for the extension service alone (R. 353, see pages 30 and 40, *infra*)—the "price" being either $69.50 or $89.00, depending upon whether the agent offers to "give" the customer a free set of fiction in addition to the encyclopedia (Fdg. 13, R. 71). Representations are often made that the regular price for the encyclopedia is much greater than $69.50 or $89.00; the price named varies with the agent, but it is often represented to be as high as $150.00 and sometimes as high as $200.00 (Fdg. 13, R. 71–72, 285, 291, 189, 202).

Department" (R. 438; Ex. 21); (4) the salesmen following up his letters claimed to represent the Standard Education Society (R. 149–150, 188, 212); (5) the Standard Education Society, after inquiry by a purchaser, acknowledged that one of these salesmen was "our representative" (Ex. 15); (6) the contracts signed by purchasers from such agents were made with the Standard Education Society (Exs. 11, 18, 36, 41); (7) checks were made payable to the Standard Education Society (R. 212); (8) the Standard Education Society acknowledged receipt of orders taken by such agents from persons who were first solicited through Knapp's letters (Exs. 19, 28); (9) in acknowledging letters addressed to the Standard Education Society, Knapp and his agents referred to the Society as "this office" and "the company" (Exs. 16, 21; R. 438); (10) the misrepresentations by Knapp and his agents were identical with those of respondents' other agents; (11) the attempts to collect from so-called Knapp customers, deceived by his misrepresentations, were made by the Standard Education Society (Exs. 20, 22, 30, 32, 45); (12) lawsuits against such customers were threatened by attorneys representing the Standard Education Society (Ex. 33).

Many persons are induced to purchase the extension service because of the representations that they are paying only for the service at its regular price, and that the ten-volume reference work, which usually costs a great deal, is being given to them free of charge (Fdg. 19, R. 76; see page 30, *infra*).

All of these representations are false and misleading (Fdg. 12, 13, R. 70, 72). The representations outlined above are made to all prospective customers; there is no list of selected customers who receive the books free (*Id.*). The regular price of the encyclopedia plus the loose-leaf extension service is $69.50; anyone writing to the respondent and asking for the price of both together will be told that he can obtain both at $69.50 (Fdg. 10, R. 69; Ex. 86, 108; R. 384).

The respondents made other false representations in selling their publications. In their advertising matter and on the back of the forms of contract were testimonials from numerous persons (Fdg. 14, R. 72; Ex. 11; Resp. Ex. 6). In addition, salesmen often stated orally that the work was approved or recommended by persons known to the purchaser (R. 133, 188, 198, 269, 277, 372–373; Ex. 44). Some of the testimonials and recommendations were completely unauthorized; others had been made with respect to Aiton's Encyclopedia, "which was a work quite different in form, in material, and in purpose from the Stand-

ard Reference Work" and the Standard Encyclopedia; and others were garbled and distorted versions of what the person named had really said (Fdg. 14–15, R. 72–74, see page 79, *infra*).

The prospectus which respondents' agents showed to customers and the fly leaves of the encyclopedias contained a list headed "Contributors and Reviewers" (Fdg. 17, R. 75; Ex. 83, 141). The Commission found that some of the persons thus named, notably Monsignor Edward A. Pace, Vice Rector and General Secretary of Catholic University, Washington, D. C., and Dr. Frank W. Ballou, Superintendent of Schools in the District of Columbia, neither contributed articles nor reviewed articles for publication in respondents' works (Fdg. 17, R. 75, 359, 363).[7] Others had contributed articles to Aiton's Encyclopedia but not to the Standard Reference Work or the Standard Encyclopedia (R. 261–266).

The respondents advertised that the New Standard Encyclopedia was a completely new and up-to-date reference work, that it was "something new under the sun" (Fdg. 15, R. 73; Resp. Ex. 6).

[7] The Commission heard evidence from only a small number of the many persons whose names were used on the list. This does not justify the inference that the other names were all used legitimately; the Commission is required to have before it *some* evidence that respondents are engaged in unfair methods of competition before issuing a cease and desist order. Once that evidence has been introduced, cumulative evidence to the same effect is unnecessary to support the Commission's finding and there is no reason why the Commission need incur additional expense in procuring such evidence.

This caused persons to believe that the work was a new publication, whereas the fact was that the New Standard Encyclopedia was nothing more than the old Standard Reference Work slightly revised (R. 405) and published under a new name.

Respondents had also published their reference work under the name of "National Encyclopedia" without disclosing that it was identical with the Standard Reference Work (Fdg. 16, R. 74). This caused some purchasers to buy the so-called National Encyclopedia in the belief that it was a separate and distinct publication [8] (*Id.*).

Respondents also operated in interstate commerce a correspondence school under the name of Standard Extension University. The "University" was started in 1924. The regular price for its course was $98 in 1924, $120 in 1925, and $135 in 1927. Prospective purchasers were informed, however, that they were receiving special introductory offers and that the regular price was $250. False representations were also made that the special price would not be continued after the agent had secured ten student purchasers (Fdg. 18, R. 75, 205, 200, 463).

The above misrepresentations deceived prospective purchasers who believed them and relied upon them in purchasing respondents' encyclopedias (Fdg. 19, R. 76). Respondents were thus enabled to sell their products in interstate com-

[8] This practice was discontinued (R. 392).

merce to persons who would not otherwise have bought them. The increase in respondents' sales diverted trade from respondents' competitors, particularly those not using such false and misleading sales methods (*Id.*).

On the basis of its findings and conclusions the Commission issued a cease and desist order, which directed the respondents to cease and desist from making each of the above-mentioned misrepresentations (R. 78–80).[9]

On January 20, 1936, the Federal Trade Commission filed in the Circuit Court of Appeals for the Second Circuit, pursuant to the provisions of Section 5 of the Federal Trade Commission Act, an application for the enforcement of the cease and desist order (R. II–XI). The respondents filed an answer denying violation of the cease and desist order and praying that the application for its enforcement be dismissed and that the order be vacated and set aside (R. XIII). The cause came on for argument on November 12, 1936, and on December 14, 1936, the Circuit Court of Appeals rendered an opinion holding that certain provisions of the cease and desist order should be reversed, others modified, and others affirmed, and that after the order had been amended in accordance with the court's opinion it should be remitted to the Commission as Special Master to hear and report

[9] For purposes of convenience, the provisions of this order are set forth hereinafter, pages 15 to 17, in connection with the modifications made by the Circuit Court of Appeals.

whether respondents had complied with the provisions of the order which were affirmed (R. 486–492). An order in accordance with this opinion was entered by the Circuit Court of Appeals on December 21, 1936 (R. 493–495).

The first nine paragraphs of the order entered by the Commission applied to all five respondents—the two corporations and Stanford, Ward, and Greener. The tenth paragraph applied to all except the Standard Encyclopedia Corporation. The ten paragraphs of the Commission's order and the disposition made of each by the Circuit Court of Appeals are set out below. The Commission ordered the respondents to cease and desist from the following practices (R. 78–80):

> (1) Advertising or representing in any manner to purchasers or prospective purchasers that any books or set of books offered for sale and sold by them will be given free of cost to said purchasers or prospective purchasers, when such is not the fact. [Reversed.]
>
> (2) Advertising or representing in any manner that a certain number of sets or any set of books offered for sale or sold by them has been reserved to be given away free of cost to selected persons as a means of advertising, or for any other purpose, when such is not the fact. [Affirmed except as to Greener.]
>
> (3) Advertising or representing in any manner that purchasers or prospective purchasers of respondents' publications are only

buying or paying for loose-leaf supplements intended to keep the set of books up-to-date for a period of ten years, when such is not the fact. [Reversed.]

(4) Advertising or representing in any manner that respondents' publication is a recently completed, new, and up-to-date encyclopedia, when such is not the fact. [Affirmed except as to Greener.]

(5) Selling or offering for sale any set of books of the same text and content material under more than one name or title. [Affirmed except as to Greener.]

(6) Advertising or representing in any manner that the usual price at which respondents' publications are sold is higher than the price at which they are offered in such advertisements or representations, when such is not the fact. [Affirmed except as to Greener.]

(7) Advertising or representing any person as a contributor to or editor of any set of books or publications who has not performed services in making or preparing contributions to or who has not performed services in the editing of such books or publication and consented that he may be held out to the public as a contributor or as an editor or assistant editor. [Modified so as to exclude from its terms contributors to Aiton's Encyclopedia, and so as to exclude Ward and Greener.]

(8) Advertising or representing that any person has given testimonials or recommen-

dations for and concerning respondents' publications, when such is not the fact. [Reversed.]

(9) Publishing or causing to be published and circulated testimonials or recommendations of and concerning respondents' publications alleged to have been made by any person when such testimonials or recommendations have not been made by such person. [Affirmed except as to Ward and Greener.]

(10) Advertising or representing in any manner to purchasers or prospective purchasers that the course of instruction is offered for sale and sold to the purchasers or prospective purchasers as a "Special Introductory Enrollment", and at a specially reduced price, when such is not the fact. [Affirmed only as to the representations regarding price, and modified so as to exclude Stanford, Ward and Greener.]

Error has been assigned as to each of the changes made in the Commission's order by the Circuit Court of Appeals. We do not intend to discuss the errors assigned as to the tenth paragraph of the order. To the extent that the Commission's order was affirmed by the court below, it is, of course, not now before this Court. *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 66; *Alexander* v. *Cosden Co.*, 290 U. S. 484, 487; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 331.

SUMMARY OF ARGUMENT

I. Respondents' representations that their encyclopedias were being given away free to prospective purchasers who bought the extension service were false and unfair. The record demonstrates that customers were deceived by these representations and induced to buy the extension service in the belief that they were receiving the encyclopedia free of charge, when in fact they were paying the regular price for the encyclopedia and the extension service. The use of such false and fraudulent misrepresentations in competition is unlawful under the Federal Trade Commission Act. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67. If the decision below is meant to be placed on the ground that these representations were not deceptive or misleading, it completely disregards the finding of the Commission, supported by ample evidence, to the contrary.

The fact that the purchaser knew what he was getting and the price he was paying did not render the misrepresentation any the less fraudulent or harmful, because no purchase would have been made at all except for the false statement. Nor can the respondents' practices be regarded as the ordinary legitimate type of free offer. When such an offer is made, the purchaser understands that he is paying only the usual price for one article in

order to obtain that article and another which is given away. If the seller in fact charges the regular price for both articles together, his representation that one is being given away free is false and intended to deceive. In the case at bar respondents attempted to make purchasers believe that the free offer was of the legitimate type when such was not the case.

The decision below cannot be supported on the ground that misrepresentations are not unfair if they are so grossly false that persons of ordinary prudence ought not to believe them. The law protects the naive against fraud as well as the cunning. It does not require a prospective purchaser to assume that "all men are knaves and liars." *Bailey* v. *Smith,* 23 F. (2d) 977, 979 (Ct. App. D. C.). Moreover, the persons shown to be deceived by respondents' misstatements were not excessively gullible; they were persons of more than average intelligence. They were merely not experienced in the sharp practices of the sort here employed.

Nor can respondents' false statements be regarded as mere trade puffing. They were not statements of opinion relating to value or quality, but direct misrepresentations of fact. Such misstatements, even when they relate to matters of price, are fraudulent and unfair.

John C. Winston Co. v. *Federal Trade Commission,* 3 F. (2d) 961 (C. C. A. 3rd), certiorari denied, 269 U. S. 555, relied upon by respondents, is not authority for the decision below, as the practice

there sustained by the Circuit Court of Appeals did not involve any misstatements of fact that the books were being given away free. In *Consolidated Book Publishers, Inc.* v. *Federal Trade Commission*, 53 F. (2d) 942 (C. C. A. 7th), certiorari denied, 286 U. S. 553, the Circuit Court of Appeals affirmed an order of the Commission prohibiting practices identical with those in question here, and that decision is in direct conflict with the decision below.

II. The practices of respondents constitute methods of competition in interstate commerce. The record shows that the respondents competed with other publishers in selling their work in interstate commerce and that persons were induced to buy by respondents' false statements.

III. The individual respondents Stanford, Ward, and Greener were properly included in the Commission's order. Together they filled all the offices and were the sole directors and stockholders of the respondent corporations. Stanford and Ward were shown by the record to be personally responsible for all of the unfair practices carried on in the name of the respondent corporations. Stanford, Ward, and Greener were the incorporators of a new company, organized after the commencement of the proceeding before the Commission, which the Commission found to have been formed for the purpose of evading its jurisdiction.

IV. The seventh paragraph of the Commission's order should not have been modified so as to ex-

clude contributors to Aiton's Encyclopedia. That paragraph prohibited respondents from advertising as contributors to its publications persons who had not in fact made contributions. Aiton's Encyclopedia, a predecessor to respondents' work, was discontinued in 1912. The Commission's order permitted respondents to list as contributors persons whose work had been carried over from Aiton's to the Standard Reference Work. The court order permitted respondents, in addition, to include the names of persons whose work had been completely eliminated from the new Reference Work. Representations that such persons were contributors to the Reference Work are false, misleading, and unfair.

V. There was evidence to support the eighth paragraph of the Commission's order, which directed respondents to cease and desist from representing that any person had given testimonials in behalf of respondents' publications when such was not the fact. The court below was not authorized to weigh the evidence and come to a conclusion different from that reached by the Commission.

ARGUMENT

INTRODUCTION

This Court has recognized that the power of the Federal Trade Commission to order the discontinuance of methods of competition depends upon three prerequisites:

(1) Are the methods used unfair?

(2) Are they methods of competition in interstate commerce, and

(3) Is a proceeding by the Commission to prevent the use of the methods in the interest of the public?

Federal Trade Commission v. *Royal Milling Co.*, 288 U. S. 212, 216; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 646–647.

The court below decided the second and third of these questions in favor of the Commission; it is the court's disposition of the first question which raises the issues here presented.[10] The court below held that a number of the false representations made by respondents to induce the purchase of their books were unfair within the meaning of Section 5 of the Federal Trade Commission Act. At the same time the court selected from the group

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[10] In the court below respondents challenged the finding of the Commission that their acts were methods of competition in interstate commerce. The court rejected this contention (R. 488–489). We anticipate that respondents will raise the same point here. This question is discussed in Point II, *infra*, pages 61 to 63.

The court below did not hold that the proceeding by the Commission was not in the public interest. This was correct; if respondents' method of selling by false representations is unfair, the action of the Commission in prohibiting it is in the interest of the public. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212.

of false representations which constituted respondents' fraudulent selling scheme the particular misrepresentation that the books were given away free and the purchaser paid only the regular price for the loose-leaf extension service; and, despite the fact that this particular falsehood was just as false and misleading as the others, held that it was not unfair within the meaning of the statute (R. 489). The petitioner's first contention is that in this respect the decision of the court below is erroneous.

I

Respondents' False Representations That the Sets of Books Offered for Sale Were Given Away Free Constitute an Unfair Method of Competition Within the Meaning of Section 5 of the Federal Trade Commission Act

That false representations constitute an *unfair* method of competition has been established by prior decisions of this Court. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67. Accordingly, it would seem sufficient, in order to demonstrate the unfairness of the methods of competition employed by respondents, to show that they are based on the use of deliberate falsehoods.

The testimony of seventy-five witnesses from Pennsylvania, New York, Ohio, Indiana, Illinois, Minnesota, Missouri, Nebraska, California, and Oregon [11] shows that the same misstatements were made by respondents' agents in all parts of the country. Both by means of written communications from the central office in Chicago and through the oral statements of salesmen, it was respondents' practice to represent that their reference work or encyclopedia was to be given away free of charge. (Fdgs. 12–13, R. 69–72, 82, 86, 88, 104, 108, 111–113, 116, 119–121, 125–126, 130, 135, 153, 168, 174, 179–181, 184, 188–189, 195, 227, 233, 255–256, 268–269, 271, 273–274, 278–279, 280, 281–282, 287, 291–293, 303, 307–309, 318, 329, 331, 343, 349, 355, 365, 371, 372; Exs. 10, 35, 48, 80, 87, 103, 104, 117.)

[11] Respondents attempt to disavow responsibility for the activities of their California sales office on the ground that the managers of that office were not their agents (R. 48). That office used the same method of selling as respondents' other agents (R. 283–358; Ex. 117), used the letterhead of the Standard Education Society, "Home Office, Chicago, Illinois," and signed letters as "Standard Education Society" (Exs. 84, 86, 87, 88, 90, 91, 92, 93). The agents claimed to represent the Standard Education Society of Chicago, representing that the California office was a branch office of the Chicago company (R. 314, 318, 319, 327, 331, 352, 355, 284, 287, 288, 291, 295, 297, 299, 303, 306, 311, 317, 324). The certificate of subscription to the loose-leaf extension service was signed "Standard Education Society, by H. M. Stanford, President" (Ex. 98), and the contracts were made with the Standard Education Society of Chicago (R. 295–296). Some of the correspondence with California purchasers, including attempts to collect from them, was conducted directly from the Chicago office (R. 288–289, 306; Exs. 100, 101).

Some prospective purchasers were subsequently informed that the gift was conditional upon a subscription to the extension service (R. 168, 193, 195, 259, 274, 307, 376); others were induced to pay for the latter by the representation that the service was necessary to keep the reference work up to date (R. 105, 111–112, 189).[12]

Thus the customer was intentionally led to believe that he could obtain both the ten-volume reference work and the extension service for the regular price of the service alone (Ex. 104; R. 353, 189). Some salesmen also offered to give free of charge sets of fiction by well-known authors to subscribers to the extension service (Fdg. 13, R. 71, 130, 307, 327, 334, 340; Ex. 87). These salesmen would represent that the price of the extension service alone was $89.00 (*Id.*). If sets of fiction were not offered, the price of the extension service was said to be $69.50[13] (Fdg. 13, R. 71–72; Ex. 106). As a matter of fact, the respondent Stanford, president of the Standard Education Society, admitted on the witness stand that $69.50 was the regular price for both the complete set of books and the extension service, and that $89.00 was the

[12] In a number of instances the customer was induced to sign her name to a contract in the belief that she was merely giving the address to which the books were to be sent and that she was to pay nothing at all, except express charges (R. 108–109, 122–123, 153–154).

[13] Needless to say, the same customers were not informed that the "regular price" of the service varied with the quantity of books to be given "free of charge."

regular price for the whole if sets of fiction were included [14] (R. 384–385).

Respondents made the above representations plausible by falsely stating that the special offer of a free set of books was made only to a few specially selected persons in the locality for purposes of advertising (Fdgs. 13–14, R. 69–71; see page 8, *supra*); that it was hoped that such persons would recommend respondents' work to others in the vicinity (R. 94, 125, 133, 135, 141, 145, 159, 168, 179, 188–189, 228, 233, 268, 274, 281–282, 295, 297, 299–301, 318, 324, 327, 349, 352; Exs. 7, 10); and that the respondents would then attempt to sell their work in the locality at the "regular price" (R. 89, 97, 126, 191, 231, 235, 291–292, 365, 369; Exs. 79, 108)—which of course was greatly in excess of what was being paid for the extension service (R. 83, 104, 117, 120, 122, 177, 181, 189, 194, 197, 231, 282, 291–292, 317, 320, 325, 328, 350, 353, 365; Ex. 108). All of the above representations were also false (Fdg. 13; R. 71–72).

The false representations that the books were being given away free were prohibited by the first paragraph of the Commission's order; the false representations that only the extension service was to be paid for, by the third paragraph (R. 79). The second and sixth paragraphs of the order for-

[14] When persons wrote to the Standard Education Society asking for the regular price of the work plus the extension service, they were informed that the price of both was $69.50 (R. 285; Exs. 86, 108).

bade false statements as to a special offer being made to selected individuals and as to the usual price being higher than that at which the books were being offered (R. 79). The Circuit Court of Appeals affirmed the second and sixth paragraphs of the order but reversed the first and third (R. 489).

Respondents' method of selling was based upon an integrated series of false statements, each of which was intended both to persuade the customer and to give credibility to the others. Each misstatement was a material inducement to the sale, but the customer was induced to purchase by all of them together. The plan was fraudulent in its entirety, and the court below was not warranted in looking at the false representations as separate unrelated statements and in classifying some of them as unfair and others as not likely to deceive.

Moreover, there is no reasonable basis for the distinction made by the court between the misrepresentations as to the books being free (paragraphs one and three) and paragraph six, which prohibits false statements as to the usual price. There is no difference in purpose, effect, or unfairness between stating falsely that the usual price for the books and extension service is a great deal more than $69.50 (paragraph six) and stating falsely that the books are free and that the usual price for the extension service alone is $69.50 (paragraphs one and three). It necessarily follows from the

latter representation, if believed, that the price of both together is much less than the usual price, and the sole purpose of the misrepresentation is to convey that impression. If a direct false statement as to the usual price is unfair, an indirect but more subtly effective method of giving the customer the same false belief as to the price is equally unfair. It is deceptive and misleading, and that is all the cases require. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67.

As this Court said in *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 388, with respect to an action in deceit:[15]

> The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.

In *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, representations which were not

[15] At several points in this brief, the law of fraud and deceit is relied upon by way of analogy. The requirements of the law of fraud are more stringent than those of the Federal Trade Commission Act (*cf. Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304), and any methods of competition which are fraudulent are *a fortiori* unfair methods of competition.

necessarily false statements of fact were regarded as unfair because calculated to convey a false and deceptive impression. In stating the facts of that case, this Court said (p. 215):

> Respondents have circulated written and printed circulars among the trade which either directly assert, *or are calculated to convey the impression,* that their product is composed of flour manufactured by themselves from the wheat. These statements and the use of the trade names under which respondents do business have induced many consumers and dealers to believe that respondents are engaged in grinding from the wheat the product which they put out. [Italics supplied.]

There can be no question that in this case respondents' statements were deliberately intended to convey a false impression.

The decision of the court below that the prohibited practices were not unfair may have been based on one of two theories. It may be interpreted as meaning that the representations in question were not deceptive or misleading.[16] Or it may be regarded as holding that even though the representations were deceptive and misleading, they were not "unfair" as a matter of law. Either view, we submit, is demonstrably unsound.

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[16] This is apparently respondents' interpretation of the opinion. See brief in opposition to petition for certiorari, pages 6 to 8.

A. THE REPRESENTATIONS WERE DECEPTIVE

Whether or not particular representations are deceptive is a question of fact. If a false statement induces persons who would otherwise not have done so to purchase an article, it is deceptive.

The Commission found (R. 76) and the record indicates that many persons purchased respondents' reference work because they believed the representations that the books were being given to them free of charge and that they were paying only for the extension service. There is ample testimony in the record that the books would not have been purchased except for the purchasers' reliance on the truth of these representations. (See particularly R. 101, 121, 255–256, 287, 308, 328, 329, 356, 357, 106, 109, 115, 117, 123, 128.)[17]

[17] Some of the above testimony was subsequently ordered stricken from the record by the trial examiner (R. 49–63). This ruling is erroneous; the evidence proved the very important fact of reliance upon the false representations in making the purchase. The rulings of the trial examiner, not approved by the Commission, are not binding on questions of evidence. The Commission permitted the evidence to remain in the record, and the Commission itself—or a court reviewing the action of the Commission—may determine the relevance or competence of this testimony in deciding whether there is any competent evidence to support the decision. *Arkansas Wholesale Grocers' Ass'n* v. *Federal Trade Commission*, 18 F. (2d) 866, 871; *Hills Brothers* v. *Federal Trade Commission*, 9 F. (2d) 481, 484. Compare the practice with respect to masters in equity, and before the Board of Tax Appeals. *Nelson* v. *United States*, 201 U. S. 92, 114; *Blease* v. *Garlington*, 92 U. S. 1, 97; *Garden City Feeder Co.* v. *Commissioner of Internal Revenue*, 75 F. (2d) 804, 807.

Miss Alice Sterling, secretary of the Y. W. C. A. in Red Wing, Minnesota, testified (R. 255–256):

A. Well, he said, somewhat as the card said, that he was not selling; he was not their salesman; he was just sort of preparing the way; that in a short time there would be several salesmen to canvass the town, and that there were just two or three—I was one of them—a couple of others—he gave one name—who were to get this set of books absolutely free, just as the postal card had said, and it was this Standard Reference Work, and he went into detail in regard to the Work, so I just thought that as a representative of the Y. W. C. A.—they were pretty hard up anyway—that if I got anything like that, as fine as that, it was up to me to take it, and after I had really decided to take the thing he spoke of the—that was a gift, and he spoke of this Reference Work, and then he spoke of the money involved, I think $3.50 a month, and $5.50 advance fee, and I said I could hardly tie the Y. W. C. A. up for that at least without calling in the board members. Then we got to talking it over, and *I thought that if the Y. W. C. A. would get that, as a gift, I decided to take the other,* and I paid him the $5.50, * * *

Well, it seemed to me—he put it as this, "We are just giving you this. This really is a gift." He kind of obligated me. It was like he said, "If we are doing this—it seems to me that we are giving this to the Y. W. C. A., and even if the Y. W. C. A. can't use

> the loose-leaf, you could use that", and *I did that so as to get that free* as a gift to the Y. W. C. A. I felt under obligation, and I signed up really for the loose-leaf, and the Y. W. C. A. were to get the set of books, and I was really to get the loose-leaf.[18] [Italics supplied.]

Mrs. Lucy Staples Wilbur, Leaburg, Oregon, testified (R. 349):

> I understood that I was getting the books free and that I was going to pay a small amount for the loose-leaf set that I would get; I think it was to be sent quarterly.[19]

Miss Elsie Anderson, a school teacher in Portland, Oregon, testified (R. 352–353):

> He told us that we were getting the set of books as a gift and that we were a certain few out of the State who were given this offer, and the reason they were giving us this offer was that they thought it would be better to give away books than to put their money into other advertising purposes or means, and they thought by giving us a set of books

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[18] In a letter in which the Standard Education Society refused to permit the cancellation of Miss Sterling's contract, the respondent stated that the books "were a gift to you as a subscriber to the loose-leaf service for which the contract was signed" (Ex. 80).

[19] Mrs. Wilbur was approached by respondents' agent shortly after she was graduated from Normal School and before she commenced teaching (R. 350). The record indicates that a great many of the persons solicited by respondents' agents were young women just entering the teaching profession (R. 83, 89, 96, 100, 107, 111, 119, 122, 350, 351).

they would use us as an advertising means, you see.

* * * * *

Then we were to get a loose-leaf extension that was to come out for ten years every three months, four times a year, and we were paying for this extension and not for the books. The books were given to us. They told us we were getting something. Well, we thought if we were getting something we might as well get it. And the first thing we knew we were to pay for something else, not the books.

* * * * *

You see, we were getting the books free, and *we were paying the regular price for the extension* but other people were paying the regular price for the extension plus this price for the books; * * * [Italics supplied.]

Mrs. Blanche Guertin, of St. Anne, Illinois, testified (R. 227):

She told me I was getting the books, the ten volumes, as a gift, I understood, and I was to pay $69.50 for the ten years' extension service.

Miss Mary Gambee, who had been teaching school for two years in Romulus, New York, testified (R. 111–115):

He said he was not an agent and was giving these books away to a certain few special teachers, * * * then he told me he wanted to know if I wouldn't subscribe to

this magazine, this loose-leaf extension service, because that would keep the encyclopedia up to date. And I didn't want to, but he kept staying and talking, and so finally I did sign my name. * * * I was to pay a certain amount by the month for the magazine, not for the other.

Q. Not for what other?

A. For the encyclopedia. * * * I remember it was less than usual, because I didn't feel that I could pay the full amount, the usual price. [R. 111–112.]

* * * * *

Q. You understood that thereby you were promising to pay a certain amount of money?

A. Yes.

Q. In exchange for what?

A. Loose-leaf service. [R. 113.]

* * * * *

Q. If the agent in this case had offered to sell you the books and the loose-leaf extension service for $69.50, payable five dollars a month, would you have accepted his proposition?

A. No. [R. 115.][20]

Miss Opal Bryson, a school teacher in Canandaigua, New York, testified:

Q. And your understanding as to the books was what?

A. That they were to be given to me free. [R. 117.]

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[20] See note 17, *supra*, page 30.

Q. If the agent had offered to sell you this set of books with the loose-leaf extension service for the total amount of $69.50, would you have accepted his proposition?

A. No. [R. 117.] [21]

On the basis of this and other evidence the Commission found (R. 76):

> Prospective customers to whom respondents' agents made said false representations and false statements and on whom said sales methods were used, relied upon the representations and statements made by said agents as aforesaid, and purchased books and extension service * * * offered for sale and sold by respondents in the belief that the said representations and statements made by respondents' agents were true. In many instances persons purchased respondents' books and the extension service in reliance upon the said false representations and false statements, when such persons would not have purchased the said books or extension service but for the false statements and false representations made by respondents' agents * * *.

This finding of fact by the Commission, amply supported by evidence, is conclusive on the question of deception. *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U. S. 67, 73; Federal Trade Commission Act, Section 5.

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[21] See note 17, *supra*, page 30.

The court below did not in terms find that there was no evidence in the record to support the Commission's finding that persons had been deceived by respondents' false representations. The only statement in the opinion from which such an inference can be drawn is the declaration that (R. 489):

> We cannot take seriously the suggestion that a man who is buying a set of books and a ten years' "extension service", will be fatuous enough to be misled by the mere statement that the first are given away, and that he is paying only for the second.

To interpret this passage as inferentially holding that persons were not in fact deceived is to bring the decision below in direct conflict both with the mandate of the statute and with the repeated rulings of this Court that the findings of the Commission must be accepted as binding if supported by evidence.[22]

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[22] Even if the evidence had not actually shown that persons were deceived, the Commission would have been authorized to draw from it the natural inference that the representations of respondents did mislead prospective purchasers. *Brown Fence & Wire Co.* v. *Federal Trade Commission*, 64 F. (2d) 934, 936; *Federal Trade Commission* v. *Balme*, 23 F. (2d), 615, 621, certiorari denied 277 U. S. 598. "The weight to be given to the facts and circumstances admitted, *as well as the inferences reasonably to be drawn from them*, is for the commission" (italics supplied). *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 63. See also *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67. The court below was not authorized to draw its own inferences from the evidence in conflict with the inferences drawn by the Commission.

Respondents take the position that there is no deception because the buyer knows exactly what he is getting and how much he is paying for it. But the most common type of unfair competition consists in causing persons to buy a product in the belief that it is manufactured by someone else. This practice is none the less unfair because the article sold is in quality exactly what the purchaser wanted or because it may be equal or superior to the product imitated. Compare *Federal Trade Commission* v. *Royal Milling Co., supra.* False representations as to the market price or market value of a commodity afford another example of deception usually held to be fraudulent, although the customer knows both what he is getting and what he is paying for the product purchased. *Zimmern* v. *Blount,* 238 Fed. 740, (C. C. A. 5th); *American Hardwood Lumber Co.* v. *Dent,* 121 Mo. App. 108, 98 S. W. 814; *Stoll* v. *Wellborn,* 56 Atl. 894 (N. J. Eq.); *Ferrell* v. *Hunt,* 189 Ind. 45, 124 N. E. 745.[23] Examples of similar frauds which do not deceive a customer either as to what he is buying or as to the price he is paying could be multiplied. The reason why all of them are regarded as fraudulent and unfair is that even though the purchaser may know what he is getting, he

[23] The cases are collected in 71 A. L. R. 622. The view of the majority of the state courts is that such representations as to market price are not mere statements of opinion. Some courts take the opposite view, when the truth is readily ascertainable by the victim of the fraud, but not when the seller is in a position to have peculiar knowledge of the facts stated.

would not have purchased at all except for the false representation.

Respondents also contend that the making of free offers is a common business practice which has never been regarded as unfair. This argument ignores both the basis for the Commission's decision and the psychological foundation for respondents' sales plan. Genuine offers to give something away free of charge in order to induce a person to buy something else are not unfair. It is a commonplace that persons may be induced to buy if they think they are getting a bargain. An opportunity to receive something free in addition to the article paid for is a powerful incentive to purchase. If a merchant thinks that his business will be benefited by the distribution of gifts, prizes, or premiums to his customers, that is his affair. His customers may gain by his apparent generosity. They cannot lose, and they are not deceived. They know that the purpose of the gift is to induce them to purchase another article, and they assume that the donor expects ultimately to recover the cost of the gift in increased returns from sales.[24]

[24] It is true that the cost of the premium is borne by the manufacturer or seller, and that this cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premium is the same as the price with the premium the premium does not cost the customer anything. It is *free to him* regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes suffi-

When such an offer of a gift is made, the customer understands from the use of the word "gift" that an article is to be received without any payment being made for it. If he is told that it is to be received "free of charge" if another article is purchased, the word "free" causes him to understand that he is paying nothing for that article and only the usual price for the other. If this is not the true situation, there is no free offer and the customer is misled by the representation that he is to be given something free of charge.

Thus if the regular price of a tube of tooth paste (to use an illustration suggested by respondents) is 35 cents and a dealer advertises that he will give away a tooth brush with each two tubes purchased, the normal understanding is that the price for the two tubes and the brush will equal the regular price for the two tubes alone—70 cents. There is nothing unfair in such a transaction. But if the dealer secretly adds the regular price of the brush to the regular price of the two tubes, his statement that the brush is free and that only the tooth paste is paid for is false in fact. The fraud is not excused by the fact that the purchaser knows that he is getting two tubes of tooth paste and a tooth brush for a known price. He might not have purchased that particular brand at all if he had been aware

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cient profit on the sale to cover the cost of the premium, whether the cost is treated as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss.

of the truth as to the usual price of the tooth paste. If he is induced to buy what he did not otherwise want, through an intentional misstatement of fact, it is immaterial that he may be getting his money's worth in the transaction. *Cf. Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67.

The vice in respondents' sales plan was that they attempted to make purchasers believe that the set of books was really a gift when it was not. The entire effort of their salesmen was to convince purchasers that in return for the regular price for the extension service alone they were receiving the service and the ten-volume reference work. To have revealed the fact that $69.50 was the regular price for both would have spoiled the scheme, and accordingly the respondents were careful not to have the true situation disclosed.

If the purchaser was not sufficiently convinced by the mere statement that the books were free, the salesman explained that the regular price for both books and service together was a great deal more than $69.50 and that the loss on this particular sale was incurred because of its advertising value. In other words, respondents did everything they could to make the customer think that the free offer was an honest offer to give away one article if another was purchased at its ordinary price. Their own false statements explaining what they

meant by their free offer demonstrated that they recognized the difference between genuine free offers and what they were seeking to make the customer believe.

It is plain from the record that respondents intentionally caused many persons to believe that the regular price of the extension service alone was $69.50 (or $89.00 if other books were to be "given away free of charge"). This is the normal meaning of respondents' representation that the books were free and that only the extension service was to be paid for, and that was the meaning which respondents intended to convey. If respondents had not managed to convey that false impression, the books would not have been sold. The fact that purchasers were deceived and that respondents hoped and intended that they would be deceived by the meaning of the so-called "free offer" should be conclusive on the question of whether the representations were deceptive and unfair.

B. THE RESPONDENTS' DECEPTIVE REPRESENTATIONS ARE NOT FAIR AS A MATTER OF LAW

If we assume that the court below did not intend to ignore the well-settled rules limiting the scope of review of Federal Trade Commission findings of fact, we must regard its decision as based on the assumption that respondents' sales methods did not constitute an unfair method of competition *even though they were false, deceptive, and mis-*

leading. Inasmuch as the general rule has been firmly established that competition through misrepresentation is unfair, it would appear that the court below was of opinion that this case required an exception to be made to that rule. Why certain kinds of lying should not be deemed unfair is not clearly explained in the opinion of the court below. It appears, however, from the language of the opinion and from the arguments of opposing counsel that three reasons may be urged in support of such an exception.

1. *The Argument That Persons Ought Not to Have Believed Respondents' Misrepresentations*

The opinion below may be regarded as resting on the principle that misrepresentations which are so obviously false that a man would be fatuous to believe them are not unfair or, stated otherwise, that false representations do not constitute unfair competition unless in the court's judgment they are of a character likely to deceive a man of ordinary prudence.

The decision below can not be supported on this ground (a) because the principle is unsound, and (b) because, even if sound, it can have no application in this case.

(a) Even respondents have recognized that acceptance of such a principle would establish "an unheard of rule of law" (Respondents' brief in

opposition to petition for writ of certiorari, p. 10).[25]

It is well settled that the illegality of fraud is not cured by the credulity of its victims. In *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516, 530, this Court, referring with apparent approval to a decision of Lord Chancellor Westbury,[26] stated:

> In considering what constitutes a material false representation, the Chancellor observed that he could not receive it as a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood, because it may be so gross and palpable as that no one is likely to be deceived by it; that if there be a wilful false statement, he would not stop to inquire whether it be too gross to mislead.

The same doctrine has received the support of the various Circuit Courts of Appeals.

As the Court of Appeals of the District of Columbia stated in *Bailey* v. *Smith*, 23 F. (2d) 977, 979:

> He whose false representations have induced another to deal with him is not stand-

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[25] Respondents maintain that the court below held that no one "could be misled" by respondents' false statements. If this means that no one was misled, it is contrary to the record. See pages 30 to 35, *supra*. If it means that persons *ought* not to be misled and that if they are the law will not protect them, it is the equivalent of the rule of law apparently adopted by the Court of Appeals, which respondents admit to be "unheard of."

[26] *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137.

> ing upon very firm ground when he takes the position that his victim ought not to have relied upon his false statements. As observed by the court in *Strand* v. *Griffith* (C. C. A.) 97 F. 854, 856: "There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act on that presumption. The fraudulent vendor cannot escape liability by asking the law to applaud his fraud and condemn his victim for his credulity."

See to the same effect *Strand* v. *Griffith,* 97 Fed. 854 (C. C. A. 8th); *Pattiz* v. *Semple,* 12 F. (2d) 276, affirmed 18 F. (2d) 955 (C. C. A. 7th); *Mergenthaler Linotype Co.* v. *Evans,* 69 F. (2d) 287 (C. C. A. 9th); *Keeler* v. *Fred T. Ley & Co.,* 65 F. (2d) 499 (C. C. A. 1st); *O'Hara* v. *United States,* 129 Fed. 551 (C. C. A. 6th); *Florence Mfg. Co.* v. *J. C. Dowd & Co.,* 178 Fed. 73 (C. C. A. 2d).[27]

In *Florence Mfg. Co.* v. *J. C. Dowd & Co.,* 178 Fed. 73, 75, the Court of Appeals for the Second Circuit itself recognized that—

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[27] In *Bailey* v. *Perkins,* 224 Mich. 27, 194 N. W. 558, the Supreme Court of Michigan declared with respect to a situation very similar to the one here at bar (p. 30):

> It is doubtless true that the plaintiff was a somewhat gullible individual. But the law does not put its seal of approval upon frauds perpetrated on such individuals. In *Smith* v. *McDonald* (1905) 139 Mich. 225, 102 N. W. 738, it was said by this court: "This contention assumes that the defrauded party owes to the party who defrauded him a duty to use diligence to

> The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.

Again in *Falter* v. *United States,* 23 F. (2d) 420, 424, the Court of Appeals for the Second Circuit stated that:

> discover the fraud. There is no such obligation. One who perpetrates a fraud cannot complain because his victim continues to have a confidence which a more vigilant person would not have. The rule contended for by plaintiff, which requires the same diligence from all persons, has no application to cases of fraud. If it had, the very persons, viz., the credulous and unwary, who are the usual victims of fraud, would be at a disadvantage, and would often be denied redress."

The decisions of the state courts are not in entire accord on this question, but the trend of modern authorities favors protection of the unwary against the defrauder. (See Annotations, 61 A. L. R. 497–509.)

In reviewing the development of the law of torts during the past 50 years, Professor Francis H. Bohlen declared:

> In one particular the law of deceit has been greatly improved. The maxim *caveat emptor* has lost much of its repulsive force. This is perhaps not a new development but a movement towards a more decent concept of business ethics which has gained great momentum in the last fifty years. Many American courts no longer require every party to a bargaining transaction to regard his opponent as a swindler. The ethics of the market place are no longer thought too ignoble a thing for the law, at one time administered by the landowning class, to reform. [Bohlen, *Fifty Years of Torts*, 50 *Harv. L. Rev.* 1225, 1246 (1937).]

> When the parties do not have equal means of knowledge, it is immaterial that the victim, if more suspicious, could have discovered the cheat.

John C. Winston Co. v. *Federal Trade Commission,* 3 F. (2d) 961 (C. C. A. 3rd), upon which respondents rely, is not inconsistent with the above authorities. Although there is language in that decision which appears to conflict with the principles approved by the other circuit courts of appeal and by this Court, examination of the facts of the case discloses that no real conflict exists. The *Winston* case is discussed and distinguished below. (See page 53 to page 56, *infra.*)

In this case the parties did not have equal means of knowledge. Respondents and their salesmen alone knew the prices charged for their encyclopedias. There was no method by which prospective purchasers could verify the statements of respondents' salesmen as to the regular price of respondents' books and extension service. If they had written to the respondents' main office, the representations of the agents that the books were free would have been reaffirmed. (R. 271; Ex. 80.)

The law does not exist merely for the protection of those members of a community able to care for themselves. On the contrary, courts of justice exert every effort to protect the young and the incompetent—those classes most likely to be imposed upon—against the defrauder. Even if the court below were correct in assuming that ordinary per-

sons would not be deceived by respondents' selling plan, respondents' practices would be unfair if directed at a class of persons who would be, and were, in fact, deceived. "It is as much an actionable fraud wilfully to deceive a credulous person with an improbable falsehood as it is to deceive a cautious, sagacious person with a plausible one." *Barndt* v. *Frederick,* 78 Wis. 1, 11, 47 N. W. 6, 9.

(b) But even if it is assumed that misrepresentations are not unfair unless they are likely to deceive men of ordinary prudence, the respondents can find no comfort in that principle. The record in this case shows that in fact respondents' false statements misled and deceived persons who were not incompetent, stupid, or unintelligent.

A great many of the witnesses, and presumably a large proportion of the persons solicited, were young women entering the teaching profession. (R. 81, 88, 90, 94, 104, 107, 110, 118, 121, 186, 232, 267, 281, 348, 351). Others were college professors (R. 131, 135, 288, 324, 330, 338, 342), physicians (R. 284, 286, 291, 303, 306, 313, 329), club women and mothers of high school students (R. 165, 168, 178, 182–183, 202)—the classes who would be expected to furnish the market for the reference work respondents sell. A few were business men (R. 96, 239, 297, 299, 311, 344), but persons of business experience would be less likely to be taken in by respondents' false representations. It may be true that business men or lawyers generally have been trained by experience not to

believe all that is told them, and that such persons might not "be fatuous enough to be misled" by respondents' false representations. But the record shows that respondents' sales efforts were aimed primarily at persons who were not familiar with the sharp practices of the market place, who were not trained to protect themselves against the plausible falsehoods of respondents' glib salesmen, and who assumed that they would be dealt with fairly and honestly.

The persons who were deceived by respondents' scheme were not dullards. On the whole they were of more than average intelligence. The fact that such persons as teachers and doctors were deceived demonstrates that many respectable and intelligent persons can be and will be misled by representations such as were made by respondents.

2. *The Argument That Purchasers Are Not Injured by the Misrepresentations*

The court below intimated that respondents' misrepresentations were not unfair because purchasers would not be damaged even though they believed the falsehood as to the books being given away (R. 489). This opinion seems to rest on the assumption that since the purchasers knew what they were getting and what they were paying, they were not injured. It expresses, in a slightly different manner, respondents' argument that persons were not deceived by the false representations, even

though they believed them and would not have purchased the encyclopedia except for them. It has been shown above (pages 36 to 40, *supra*) that such representations were in fact deceptive and that the argument is unsound.

The argument is similar to the one made and rejected in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, that a false representation as to the class of manufacturers of the commodity was not unfair because the customer received an article equally as good as he expected and therefore was not damaged. This Court there declared (pp. 216–217):

> If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. Here the findings of the commission, supported by evidence, amply disclose that a large number of buyers, comprising consumers and dealers, believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain. The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of opinion that the purchasing public

> is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial.

See also *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S., at 78.[28]

The prospective purchasers in this case are injured if they pay $69.50 for an encyclopedia they did not want and would not have bought except for their reliance upon respondents' false representations. The fact that the reference work may ordinarily have sold for $69.50 does not make the injury any the less real to them, because they have given up $69.50 which they would have retained except for the false statements.

3. *The Argument That Respondents' Misrepresentations Are Mere Trade Puffing*

It might be urged that the representations here in question fall in the class of trade puffing, and that such puffing is not unfair competition. Trade puffing is usually understood to cover exaggerated opinions as to value and quality, not definite misstatements of fact. *United States* v. *New South Farm Co.*, 241 U. S. 64; *cf. Fairyfoot Products Co.*

[28] In *Wilson* v. *United States*, 190 Fed. 427 (C. C. A. 2nd), previously before this Court on other grounds, 221 U. S. 361, it was held that damage to the purchaser was not an essential element of the criminal offense of using the mails to defraud, whatever might be the rule in civil suits for damages. Proof that the property misrepresented was worth less than the price paid was held unnecessary. The same policy should be applicable under the Federal Trade Commission Act.

v. *Federal Trade Commission,* 80 F. (2d) 684 (C. C. A. 7th); *Ostermoor & Co.* v. *Federal Trade Commission,* 16 F. (2d) 962 (C. C. A. 2nd); *New Jersey Asbestos Co.* v. *Federal Trade Commission,* 264 Fed. 509 (C. C. A. 2nd); *Vulcan Metals Co.* v. *Simmons Mfg. Co.,* 248 Fed. 853 (C. C. A. 2nd).

The representations by respondents that their reference work was given away free and that only the extension service was to be paid for were statements of fact, not of opinion. Such deliberate falsehoods with respect to actual facts have never been regarded as legitimate or fair. *United States* v. *New South Farm Co.,* 241 U. S. 64, 71; *Harris* v. *Rosenberger,* 145 Fed. 449, certiorari denied 203 U. S. 591.[29]

This applies to misrepresentations with respect to price,[30] as well as to misrepresentations of quality (*Federal Trade Commission* v. *Algoma Lumber Co., supra*), or origin (*Federal Trade Commission* v. *Royal Milling Co., supra*). The court below itself recognized that the false statement that respondents' books were being sold below the usual price was unfair.[31] This ruling that a false state-

[29] In *Colburn* v. *United States,* 223 Fed. 590 (C. C. A. 8th), the court intimated that a deliberate attempt to defraud could never be justified on the ground that it was mere trade puffing.

[30] Statements as to *value* are, of course, distinguishable. Even such statements, however, when made with respect to commodities having a definite market value, are fraudulent. See page 37, *supra.*

[31] The court affirmed paragraph 6 of the Commission's order prohibiting such false statements.

ment of fact as to price is forbidden by the Federal Trade Commission Act is supported by other decisions in the Circuit Courts of Appeals. In the first case arising under the Federal Trade Commission Act, *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307, the Court of Appeals for the Seventh Circuit held that the Act was violated by false representations that Sears, Roebuck was selling sugar at a price lower than that of its competitors because of its large purchasing power, when the truth was that the sugar was sold below cost as a "loss leader" to induce the purchase of other commodities.[32] In *Brown Fence & Wire Co.* v. *Federal Trade Commission,* 64 F. (2d) 934, the Circuit Court of Appeals for the Sixth Circuit held that a false representation that goods were cheaper because sold "direct from factory" to customer, when such was not the case, was an unfair method of competition.

The cases dealing with the very practices here in question in the encyclopedia industry, which are most closely in point, also support the position that

[32] The court held that although selling below cost was not unfair, the making of false representations with respect to the low price was unfair. In the *Sears, Roebuck* case, one of the practices forbidden was that of selling at less than cost on condition that customers purchase other goods at the same time, when accompanied by a false representation that the low price was due to large purchasing power. This closely resembles the practices of respondents here.

false representations as to price are unfair.[33] They are discussed at length immediately below.

4. *The Winston and Consolidated Book Publishers Cases*

John C. Winston Co. v. *Federal Trade Commission,* 3 F. (2d) 961 (C. C. A. 3rd), certiorari denied 269 U. S. 555, and *Consolidated Book Publishers Inc.* v. *Federal Trade Commission,* 53 F. (2d) 942 (C. C. A. 7th), certiorari denied 286 U. S. 553, both dealt with unfair practices similar to those of respondents in the sale of encyclopedic reference works. The Court of Appeals regarded these cases as conflicting, and assumed that the *Winston* case supported its decision. Close examination of the cases will reveal that the *Winston* case clearly does not support the decision below, and that the *Consolidated* case is in direct conflict with it.

The *Winston* case was decided by the Court of Appeals for the Third Circuit in 1925. The facts were stipulated. It was shown that before the Federal Trade Commission commenced its investigation, the Winston Company, a publisher of reference works and an extension and research service similar to those distributed by respondents, furnished its salesmen with subscription blanks reading, in so far as is here relevant, as follows:[34]

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[33] False statements as to price are now generally regarded as fraudulent in actions for fraud and deceit, although the state courts are divided on the question. See the annotations in 71 A. L. R. 622, 66 A. L. R. 188.

[34] The parts of the contracts here quoted were described in the opinion of the Circuit Court of Appeals, 3 F. (2d) 961–

ADVERTISING DEP'T—SPECIAL CONTRACT

Please send to me—		
WINSTON'S ENCYCLOPEDIA IN TEN VOLUMES	~~$55.00~~	
WINSTON'S ANNUAL SERVICE FOR 10 YEARS	~~40.00~~	
INTERNATIONAL BUREAU OF RESEARCH SERVICE FOR 10 YEARS		
	~~$104.00~~	$49.00
For which I agree to pay	~~$104.00~~	$49.00

The regular price at which the encyclopedia and the two services were ordinarily sold was $49.00. With respect to this practice, the Court of Appeals said, "When the Federal Trade Commission inquired into its practices the company consulted counsel who gave it the sound advice to stop this method of sale. This it did at once; and it did it in evident good faith. Later, however, the company adopted another method which consisted of furnishing its salesmen with subscription blanks containing substantially the same wording as the former but omitting the printed prices." 3 F. (2d) at 961–962. The new subscription blanks read substantially as follows: [35]

Please send to me—

WINSTON'S ENCYCLOPEDIA IN TEN VOLUMES
WINSTON'S ANNUAL SERVICE FOR 10 YEARS
INTERNATIONAL BUREAU OF RESEARCH SERVICE FOR 10 YEARS

For which I promise to pay $49.00

962. The excerpts quoted are copied directly from the record in the *Winston* case in this Court, No. 511, October Term 1925, R. 21, Exhibit B.

[35] No. 511, October Term 1925, R. 25, Exhibit D.

It should be noted that the phrase "Advertising Dep't—Special Contract" written at the top of the original contract was omitted from the second, and that all representations as to the usual price for all three services together being greater than $49.00 were also omitted.

Although it was contended that the latter form of contract conveyed the impression that the price was a special one paid only for the two services and that the ten-volume work was free, the contract contained no statement that the encyclopedias were free and the court did not refer to any such representation in its opinion. In fact, the record in the *Winston* case contains no evidence of any such misrepresentation after the second form of contract was substituted for the first.[36] The Circuit

[36] The stipulation of facts in the *Winston* case contains the following paragraph (R. 145–146, No. 511, October Term 1925):

> Since May 1, 1923, and up to the date hereof, the respondent through its said agents and salesmen represented and still represents to the aforesaid purchasers and prospective purchasers that the said price of $49 represents *the fair value* of the said Annual and Research Services, and that by obtaining not only the said Services but also the ten volumes of the encyclopedia for that price the purchaser *in effect* would obtain the said ten volumes free of charge. [Italics supplied.]

On the basis of this paragraph, and this alone, the Commission made findings that the agent of respondents had represented that $49 was the *value* (not the regular price) of the research and extension services, and that thus they were *in effect* obtaining the ten volumes free of charge. 8 F. T. C. 185. There is a substantial difference between a representation as to the value of a service and the effect of

Court of Appeals refused to pass upon the validity of the first practice of the Winston Company on the ground that it had been discontinued. It was with respect to the second kind of sales blank that the court said (p. 962):

> It is conceivable that a very stupid person might be misled by this method of selling books, yet measured by ordinary standards of trade and by ordinary standards of the intelligence of traders, we cannot discover that it amounts to an unfair method of competition within the sense of the law.

This language must obviously be read in the light of the facts of the case before the court. This Court denied certiorari. 269 U. S. 555.

The plan abandoned by the Winston Company upon the commencement of the Federal Trade Commission investigation is in substance the same as that practiced by respondents here.[37] Although the unfairness of this plan was not passed upon by the court, the opinion indicates clearly that the plan was not approved. The second practice, which the court found not unfair, involved no false representations. Accordingly the case can not be regarded as supporting the decision of the court below in the instant case that the false statements here in question are not unfair.

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a purchase at a particular price and specific false statements that the regular price of the service is $69.50 and that the ten volumes are in fact being given away free.

[37] In some instances the representations by respondents' agents were almost identical with the plan abandoned by the Winston Company. See Exhibit 133; R. 365, 375, 376.

In the *Consolidated Book Publishers* case, 53 F. (2d) 942, the Circuit Court of Appeals for the Seventh Circuit upheld an order of the Federal Trade Commission prohibiting a sales plan substantially identical with that involved in the instant case. The second and the fourth paragraphs of the Commission's order in that case are almost identical with the first and third paragraphs of the Commission's order here.[38] The letter sent out by the publishers in that case (printed at 53 F. (2d) 943) is almost identical with Exhibits 10, 14, 24, 27, 35, 40, 43, and 48 here. Salesmen represented falsely to prospective purchasers in that case that the books were being given away free of charge, and that the amount paid was the price of the extension service alone.[39]

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[38] Compare the provisions of the order quoted in 53 F. (2d), at 942, with the order in this case (R. 79).

[39] In the *Consolidated* case, the publisher was also guilty of subsequently charging 20¢ extra for each issue of the extension service after having assured the purchaser that the original price was all that he had to pay, and of representing that it had an expert research bureau when such was not the case. But these added factors do not justify those provisions of the Commission's order which prohibited the false representation as to the gift of the encyclopedia, and accordingly afford no basis for distinguishing the two cases. In any event, if misrepresentations made with respect to other matters warranted the Commission's order in that case, the misrepresentations made in this case in addition to those forbidden by the first and third paragraphs of the Commission's order should have the same effect. See paragraphs 2, 4, 5, 6, 7, 8, 9, and 10 of the Commission's order (R. 79–80).

The Circuit Court of Appeals characterized the practice prohibited by the Commission as a "fraud", and held that the Commission's order came within the rule of *Federal Trade Commission* v. *Winsted Hosiery Co., supra.* The Publishing Company petitioned for certiorari, alleging *inter alia* that the writ should be granted because the decision was in conflict with the *Winston* decision of the Circuit Court of Appeals for the Third Circuit. See petition for certiorari, No. 843, October Term 1931, pages 2 and 4. The government, opposing certiorari, maintained that the decisions did *not* conflict, inasmuch as the *Winston* decision "involved only the use of subscription blanks listing as articles to be sold an encyclopedia and two accompanying services, a single price for all three items being written in red ink" (brief in opposition, *id.*, p. 14).

This Court denied certiorari, 286 U. S. 553. Presumably the writ would have been granted if the *Winston* case had been regarded as having the effect respondents seek to give it now, for in that event there would have been a conflict between the decisions in the seventh and third circuits.[40]

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[40] Respondents also rely on *Chicago Portrait Co.* v. *Federal Trade Commission*, 4 F. (2d) 759 (C. C. A. 7th, 1925), certiorari denied 269 U. S. 556, decided by the same Circuit Court of Appeals that decided the *Consolidated Publishers* case in 1931. Inasmuch as the same court subsequently held unlawful the very practices now engaged in by respondents, the earlier case can not be regarded as authority in support of the decision below. It was pointed out in the *Portrait*

C. THE FALSE REPRESENTATIONS THAT RESPONDENTS' BOOKS WERE TO BE GIVEN AWAY WERE AN INTEGRAL PART OF RESPONDENTS' FRAUDULENT SCHEME AND CANNOT BE SEPARATED FROM THE REMAINDER

The record demonstrates that the false representation that the encyclopedias were to be given away without charge was the foundation of respondents' sales plan. In order to bolster up the salesmen's stories in this regard, it was also represented (1) that the offer was open only to a few selected individuals and (2) that the regular price of the whole set greatly exceeded $69.50. The court below regarded the last two statements as unfair, although they clearly appear to be subordinate to the basic misrepresentation which the court held not to be unfair.

The court may have been of opinion that the false statement as to the "free offer" *alone* would not have deceived prospective purchasers sufficiently to induce them to buy. The record does not support this conclusion. (See pages 30–35, *supra*.) But even if it be assumed that this were the case, the decision below would not be justified. For the Act makes unlawful and authorizes the Commission to prohibit "unfair methods of competition," and this necessarily implies that all of the misleading acts of which the unfair method of competition is comprised may be prohibited.

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case that there was no testimony that customers had actually been deceived and that, so far as appeared, all competitors used the same objectionable methods of competition. 4 F. (2d) at 761.

It is well established in the law of fraud that a false representation need not be the sole inducement to a contract if it is a material inducement. *Farrar* v. *Churchill,* 135 U. S. 609, 615; *Tooker* v. *Alston,* 159 Fed. 599, 604; *Davis* v. *Louisville Trust Co.,* 181 Fed. 10, 21; 26 Corpus Juris 1165–1166. Even if the remaining representations are true, a single material false representation which is one of the inducements upon which a person relies in making a contract constitutes actionable fraud. 26 Corpus Juris 1166. *A fortiori,* where, as here, all the representations inducing the purchase are false, no single misrepresentation can be excused on the ground that it alone would not have been sufficient to bring on the sale.

If the misrepresentation as to the free offer in this case would not deceive by itself, neither would any of the other false representations made. A purchaser would ordinarily not be induced to buy by a representation that he was on a selected list of favored persons, if nothing was said about a reduced price. Statements that the price at which the books were offered was below the regular selling price might not have been believed without the added representation that the loss on this particular sale was assumed as an advertising expense. Thus if the court was to look at each item separately to see whether it alone would deceive, no part of respondents' fraudulent scheme might be called "unfair."

Such a construction of the phrase "unfair methods of competition" would go far toward nullifying the statutory provision, since many unfair methods of doing business are made up of separate statements or representations, none of which might be sufficient by itself to deceive. If respondents adopt a fraudulent selling plan made up of a number of false representations, all of the false statements which comprise the scheme are parts of the "unfair method of competition" forbidden by the law. Respondents established their scheme as an integrated whole; it must be treated as a whole if the statutory prohibition is to be effective.

II

The Practices of Respondents Constitute Methods of Competition in Interstate Commerce

The court below found that the Commission was justified in finding that the forbidden practices affected interstate competition (R. 488). Inasmuch as respondents may urge here, as they did below, that the Commission's findings in this respect are unsupported by evidence, we will discuss the question briefly.

The record establishes that the respondent corporations compete with other publishers in selling their reference work in interstate commerce. This was admitted both in respondents' answer [41] and by

[41] The complaint alleged that respondent competed in interstate commerce with other publishers (R. 2–3, 22). This was not denied in the answers of the Standard Education

Mr. Stanford on the witness stand (R. 384, 419). The record also shows that at least one publisher of a competing reference work does not engage in the unfair sales method employed by respondents (Fdg. 9, R. 68, 163–165).[42] It also shows that many persons purchased respondents' publications who would not have done so except for the false representations made to them (Fdg. 19, R. 76; see pp. 30–35, *supra*). From these facts the Commission was entitled to draw the logical inference that respondents' unfair practices would be likely to divert trade from other competitors to respondent.

It is well established that the inferences to be drawn from the facts in the record are for the Commission to determine. See note 22, *supra*, page 36.

If the Commission has before it evidence of competition it need not have testimony as to actual cases of diversion of trade from one competitor to another in order to warrant the conclusion that trade will be diverted. *Federal Trade Commission*

Society or the Standard Encyclopedia Corporation (R. 8, 27), and accordingly must be deemed admitted. See Rules of Practice of the Federal Trade Commission, Rule III (of which respondents were given notice, R. 6, 25–26), which provides that "any allegation of the complaint not specifically denied in the answer unless respondents shall state in the answer that respondents are without knowledge shall be deemed to be admitted to be true and may be so found by the Commission" (R. 6, 25–26).

[42] The competing work was named the New Students Reference Work. Respondents represented that their work would be valuable for students (see testimonials on Exhibit 11) and there was evidence that the work was of value to students (R. 310, 315, 371–372, 148, 182–183).

v. *Raladam Co.*, 283 U. S. 643, 651, 653; *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615, 621, certiorari denied 277 U. S. 598; *Brown Fence & Wire Co.* v. *Federal Trade Commission*, 64 F. (2d) 934; *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F. (2d) 39, 41.

In the court below respondents relied upon the *Raladam* case to support their contention that the practices involved in this case were not methods of competition in interstate commerce. But that case required only that it appear "by proof" or "by necessary inference" "that there be present or potential substantial competition" threatened with injury (283 U. S. at 651). There was in that case no proof of "any real competition * * * in the interstate market" (283 U. S. 643, 652). In the instant case, the existence of interstate competition is admitted. The *Raladam* case is thus clearly distinguishable.

The same argument made by respondents was rejected in *Consolidated Book Publishers, Inc.* v. *Federal Trade Commission*, 53 F. (2d) 942 (C. C. A. 7th), certiorari denied 286 U. S. 553.[43]

[43] It is significant that the *Consolidated* case was decided after the decision of this Court in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643. The record in the instant case is, of course, not exactly the same as in the *Consolidated* case. The orders of the Commission in the two cases were issued at about the same time, however (the order in the *Consolidated* case was issued May 6, 1930, and in the instant case December 24, 1931), and there can be no question that competitive conditions in the industry did not substantially change during that period.

III

The Respondents Stanford, Ward, and Greener Were Properly Included in the Commission's Order

The respondent Stanford is president, general manager, a director, and owner of 250½ shares out of the 536 shares of stock of the Standard Education Society, and was one of the three incorporators and acting president of the Standard Encyclopedia Corporation[44] (R. 12, 381–383, 398, 412). The respondent Ward was vice-president, secretary, sales manager, a director, and owner of 250½ shares of the stock of the Standard Education Society (R. 30, 383, 406, 412, 424), and an incorporator and director of the Standard Encyclopedia Corporation (R. 30, 424). The respondent Greener was in charge of the financial affairs of the Standard Education Society as auditor and manager, owned 35 shares of the stock of that Society,[45] and was one of the three original incorporators of the Standard Encyclopedia Corporation (R. 32–33, 406, 426–427, 467). Stanford, Ward, and Greener

[44] The Standard Encyclopedia Corporation did not formally elect officers, and issued no stock (R. 416, 417, 424). Mr. Stanford admitted on the stand that he was a director of the corporation (R. 423). In their respective answers Mr. Ward admitted that he was (R. 30), and Mr. Greener that he had been (R. 32–33), a director, but Mr. Ward testified that he did not know if any formal action had been taken as to directors (R. 424).

[45] Stanford testified that Greener was a director of the Standard Education Society (R. 412), but Greener testified to the contrary (R. 427).

together owned all the stock [46] and, in so far as it appears, filled all the offices, were the sole directors and were in every respect the sole managers of the business carried on by both the Education Society and the Encyclopedia Corporation (Fdg. 5, R. 67). These three persons were directly and solely responsible for all the activities of the respondent corporations.

The Commission had made the Standard Education Society and Stanford parties to its original complaint filed on February 25, 1929 (R. 2). During the summer of 1929, after much of the evidence in this case had been introduced, the Standard Encyclopedia Corporation was organized with Stanford, Ward, and Greener as sole incorporators (R. 404). The name of the respondent publication was changed from Standard Reference Work to Standard Encyclopedia, and the latter was sold to the public in the name of the new corpora-

[46] The distribution of stock described in the text was as of the date of the hearing before the trial examiner. The total authorized stock issue of the Standard Education Society was a thousand shares (R. 382). In addition to the stock owned by Stanford, Ward, and Greener, a number of sales directors and salesmen had formerly been stockholders, but all of their stock had been bought in by the corporation during the early part of 1929 and none of it had been reissued (R. 382–383, 406). This explains the significance of the ownership of exactly 250½ shares each by Stanford and Ward. Its obvious purpose was to retain in their hands complete control of the corporation through ownership of 501 out of the 1,000 authorized shares, the remaining being owned by subordinate officers and employees.

tion (R. 404–406). This fact was not disclosed to the Commission until the final day of the hearing under its original complaint (R. 16). To prevent what it regarded as an attempted evasion of its jurisdiction, the Commission then issued a supplemental complaint making the Standard Encyclopedia Corporation, Ward, and Greener respondents along with the Standard Education Society and Stanford (R. 20–26). The order finally entered by the Commission prohibited all the respondents, individual and corporate, from engaging in each of the unfair practices carried on in the name of the respondent corporations (R. 78–80).[47]

The court below modified the order of the Commission in so far as it included respondent Stanford in the tenth clause and Ward in the seventh, ninth, and tenth; and it reversed the order completely as to Greener. We do not raise here any contention as to the tenth clause of the Commission's order. Accordingly, the questions presented relate to the exclusion of Ward from the seventh and ninth clauses and of Greener from the entire order.

Consideration of these questions requires an examination of the scope of the power of the Commission over persons who control, manage, and are responsible for the activities of corporations engaging in unfair methods of competition. The gov-

[47] The Standard Encyclopedia Corporation was not bound by the tenth clause of the order (R. 79–80).

ernment submits that the Commission may properly include the individual officers, directors, and stockholders of a corporation within the scope of a cease and desist order, (a) if they are personally responsible for the wrongful acts of the corporation, or (b) if it is necessary to include them to prevent evasion of the order. Under the first of these theories the order of the Commission should have been affirmed as to Stanford and Ward, and under the second, as to Stanford, Ward, and Greener.

A. STANFORD AND WARD WERE BOTH PERSONALLY RESPONSIBLE FOR THE UNFAIR PRACTICES OF THE CORPORATE RESPONDENTS

The Government does not contend, of course, that one is personally responsible for the unlawful acts of a corporation merely because he is a stockholder, a director, or an officer of the company. But the persons who manage corporate affairs cannot escape liability for unlawful acts which they personally control and supervise by hiding behind the corporate entity. This is generally recognized. *Tyler* v. *Savage*, 143 U. S. 79; *McCandless* v. *Furlaud*, 296 U. S. 140, 165; *National Cash-Register Co.* v. *Leland*, 94 Fed. 502 (C. C. A. 1st); *Saxlehner* v. *Eisner*, 147 Fed. 189 (C. C. A. 2d), certiorari denied 203 U. S. 591; *Hitchcock* v. *American Plate Glass Co.*, 259 Fed. 948 (C. C. A. 3d); *Denominational Envelope Co.* v. *Duplex Envelope Co.*, 80 F. (2d) 186, 194 (C. C. A. 4th); *Barry* v. *Legler*, 39 F. (2d) 297 (C. C. A. 8th); *Northwest Theatres Co.* v. *Han-*

son, 4 F. (2d) 471 (C. C. A. 9th); *Robert Findlay Mfg. Co.* v. *Hygrade Lighting Fixture Corp.,* 288 Fed. 80 (E. D. N. Y.); *United States* v. *Winslow,* 195 Fed. 578, 581 (D. Mass.), affirmed on other grounds 227 U. S. 202.

The language of the Court of Appeals for the Second Circuit in *Saxlehner* v. *Eisner,* 147 Fed. 189, 191, certiorari denied 203 U. S. 591, is peculiarly appropriate in the case at bar. The court there said with respect to the personal liability of the executive officers of a corporation:

> * * * No one can read the testimony of the defendants including that taken in the suit against the corporation (which was put in evidence here) without being convinced that they were practically the corporation, managing it, and controlling its affairs as if it were a partnership, with themselves sole partners; that the scheme of pirating complainant's label originated with them, was worked out and carried into effect by their personal exertions; and that in reality the corporation was but the cover for their individual enterprises. Under such circumstances there might be a failure of justice if the plaintiff who has seen his trade-marks boldly appropriated for many years should be denied any relief against the individuals through whose pernicious activity alone he has been made to suffer the consequent loss.

The court below recognized and accepted these principles. It found that (R. 488):

> Stanford and Ward were jointly in complete control of both companies; as we have said, Stanford was not only president, but acted as general manager, and he was shown to have personally conducted the correspondence. Ward was sales manager, and necessarily familiar with what advertisements went out, and with the general sales policy of the company. This was enough to hold each personally for any "unfair" advertisements or sales methods, with certain exceptions to be noted later.

In excluding Ward from the operations of the seventh and ninth paragraphs of the Commission's order, however, the court below apparently assumed that in order to show personal participation by any individual in a corporate activity, there must be *direct evidence* of his personal connection with that activity. Such a rule might ordinarily be satisfactory. But it is not appropriate when one or two individuals are the controlling stockholders, directors, officers, and managers of a corporation and completely control its operations; in those circumstances the Commission or a court may infer without further evidence that they are personally responsible for the policies and acts of the corporation and its minor employees.

The Circuit Court of Appeals held that since Ward was sales manager of the Standard Education Society, he could not have been involved in the activities forbidden by the seventh and ninth paragraphs of the Commission's order—the use of garbled testimonials and false lists of contributors. But Ward was not merely a sales manager. He was vice-president, secretary, one of the two controlling stockholders,[48] and a director. See page 64, *supra*. A letter written by him in Stanford's absence, in answer to a complaint about a false testimonial, indicates that both he and Stanford were familiar with the advertising of the respondent corporation.[49] The testimonials and list of contributors were displayed by salesmen working under Ward's immediate supervision. The use of these materials was thus subject to the control both of the president, Stanford, and of the sales manager, Ward.

The Commission has the power to draw inferences of fact from the evidence before it. *Federal Trade Commission* v. *Pacific States Paper Trade*

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[48] That Stanford and Ward controlled the corporation jointly is indicated by the distribution of the stock so as to give both together stock control, when all the stock was issued, through ownership of 501 of the 1,000 shares. See note 46, *supra*, page 65.

[49] In Exhibit 64, a letter from Mr. Ward to Professor Goode of the University of Chicago, Mr. Ward stated "I am familiar with the situation and I have direct charge of the sales organization, so I can give you the immediate assurance that the proper action will be taken."

Association, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67, 73. In the exercise of this power the Commission properly found that Ward and Stanford were jointly responsible for the activities of the respondent corporation. This finding was conclusive because it was supported by substantial evidence. It was error for the court below to substitute its judgment for that of the Commission and to modify those provisions of the cease and desist order which were based upon this finding.

B. A DECREE BINDING THE INDIVIDUAL RESPONDENTS WAS WARRANTED AS A MEANS OF PREVENTING EVASION OF THE COMMISSION'S ORDER

It is a familiar practice in suits against corporations to insure enforcement of judicial decrees by applying them both to the corporation and to its officers, agents, or employees. See *Wilson* v. *United States,* 221 U. S. 361, 376; *Mayo* v. *Dean,* 82 F. (2d) 554, 556 (C. C. A. 5th). The orders of the Federal Trade Commission are customarily drawn in the same manner. See *Federal Trade Commission* v. *Hoboken White Lead & Color Works,* 67 F. (2d) 551 (C. C. A. 2d); *Federal Trade Commission* v. *Civil Service Training Bureau,* 79 F. (2d) 113, 116 (C. C. A. 6th); *Federal Trade Commission* v. *Wallace,* 75 F. (2d) 733, 738 (C. C. A. 8th).

The purpose of this device is to make judicial decrees effective without attempting the impossible task of naming all the employees of a company who

might disobey. The device renders it unnecessary for the Commission to name the officers and agents of a corporate respondent in its order. But if the Commission can identify the persons whom it deems most likely to violate the order, it is certainly not improper to name them. See *Guarantee Veterinary Co.* v. *Federal Trade Commission,* 285 Fed. 853, in which the president and manager of a corporation was made an individual party to the suit. *Cf. Mayo* v. *Dean, supra.*

When there is a possibility that the business may be transferred from the corporation subject to the Commission's order to a new organization operated by the same individuals, the Commission's order may be ineffective if the individual officers and agents are not named in it. If the corporation ceases to do business and the illegal activities are carried on individually or through another company, the individuals involved may assert that they are no longer agents or employees of the corporation which was a party to the decree and that accordingly they are no longer bound by it.

If such a stratagem is to be prevented, the Commission must have power to make the individual owners and managers of a company parties to its proceeding and order, regardless of whether or not they have been proved to be personally responsible for the unfair method of competition. As the Circuit Court of Appeals for the Eighth Circuit declared in *Federal Trade Commission* v. *Wallace,* 75 F. (2d) 733, 738, the "decree should be broad

enough to give effective relief and to prevent evasion."

In *Local 167* v. *United States*, 291 U. S. 293, this Court stated, with respect to an equity decree under the Sherman Act, (at p. 299):

> The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. *It should be broad enough to prevent evasion.* In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532. [Italics supplied.]

The scope of the Commission's power to frame its orders, which are enforceable only through affirmance by a court similar to a court of equity, should be equal to that of a court of equity.

A decree binding the individual respondents was particularly appropriate in the case at bar. After the Federal Trade Commission proceeding had been begun, the respondents Stanford, Ward, and Greener *did* organize a new corporation to distribute their encyclopedias under a new name, and the Commission issued a supplemental complaint in order to bind the new company by its order (R. 16–21). In order to prevent the use in the future of a new corporation to evade the order, the Commission made Stanford, Ward, and Greener parties to the proceeding.

Whether or not the individual respondents were in fact attempting to avoid the effect of the Commission's order by the formation of the new company,[50] the Commission's order was proper as a means of preventing such attempts at evasion in the future. The orders of the Commission operate *in futuro*; their purpose is to protect the public and competitors against methods of competition deemed unfair. The Commission should have broad discretion to frame its orders so as to achieve that purpose. That discretion is clearly not abused by making the order personally applicable to the individuals who completely control and dominate a corporate respondent.

This is certainly true here where the parties have shown a prior willingness to shuffle corporate

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[50] Respondent Stanford, obviously an interested witness, explained that the new corporation was organized for a legitimate purpose (R. 404), but the Commission did not believe him. In its findings it declared (Fdg. 20, R. 76):

> The Commission concludes and infers from the record in this case and so finds that this corporation [the Standard Encyclopedia Corporation] was organized by the individual respondent for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent Standard Education Society.

The Commission clearly is the judge of the credibility of the witnesses appearing before it. *Wholesale Grocers' Ass'n* v. *Federal Trade Commission*, 277 Fed. 657. Study of Stanford's testimony indicates that he was an evasive rather than a frank witness (R. 435, 430–431, 433, 438, 383, 384, 398, 399, 419).

entities. Stanford, Ward, and Greener were made parties to the present proceeding because they were the incorporators of the new corporation, and because they would, in all probability, be the incorporators of any other new corporation to be formed in the future as a means of evading the Commission's order. The order binding them individually should have been affirmed.

C. THE INDIVIDUAL RESPONDENTS WERE ENGAGED IN INTERSTATE COMPETITION

The individual respondents urged below that they were not subject to the jurisdiction of the Commission because they were not *individually* engaged in interstate competition but acted only as agents of the corporations. Regardless of whether or not they were acting as agents, they were personally responsible for the sale and distribution of the encyclopedias in interstate commerce and for the unfair methods of competition used in connection therewith. They were not subject to the control of any superior officer; they were the supreme managers of the business. The authorities already cited make it plain that the fact that their unlawful conduct was carried on in the name of the corporations does not shield them. See page 67, *supra*. An identical argument was rejected by the Court of Appeals for the Second Circuit in *Guarantee Veterinary Co. v. Federal Trade Commission*, 285 Fed. 853, 860.

IV

The Circuit Court of Appeals Erred in Modifying Paragraph Seventh of the Commission's Order

Paragraph seven of the Commission's order directed the respondents to cease and desist from (R. 79):

> (7) Advertising or representing any person as a contributor to or editor of any set of books or publications who has not performed services in making or preparing contributions to or who has not performed services in the editing of such books or publication and consented that he may be held out to the public as a contributor or as an editor or assistant editor.

The court below affirmed this order generally, but modified it so as to exclude contributors to Aiton's Encyclopedia.[51]

The original predecessor of the Standard Reference Work and Standard Encyclopedia, published by respondents, was Aiton's Encyclopedia, published between 1909 and 1912 (Fdg. 6, R. 67). The name of this publication was changed to Standard Reference Work in 1912 and to New Standard Encyclopedia in 1929. The respondent Stanford testified that the reference work was "revised rather thoroughly every two or three years" (R. 387). The changes in size and substance of the

[51] The court also modified this clause of the order so as to exclude Ward and Greener from its operations. This question is considered at pages 64 to 75, *supra*.

work were described by Mr. Stanford as follows (R. 388):

> Aiton's Encyclopedia appeared first in five volumes. The Standard Reference Work appeared first in six volumes. The material in those was increased from time to time with additions, and the number of volumes increased up to the present number ten.
>
> * * * * *
>
> In 1923 it appeared first in ten volumes, but two of those volumes were special teacher material. Last year the special teacher material was dropped from the set and the alphabetically arranged encyclopedia material was extended to fill ten volumes.

At the beginning of the reference work and prospectus (1926 and 1927 editions) was a list of authors, editors, contributors, and reviewers (Exs. 83, 141).[52] This list contained the names of persons who had contributed to Aiton's original encyclo-

[52] This list was omitted from the New Standard Encyclopedia (1930 edition) (R. 434), and replaced by a statement of authorship (Resp. Ex. 4). The latter statement declares that "The new Standard Encyclopedia has been compiled by the editorial staff of the Standard Education Society, numbering among its members men of note in encyclopedic compilation for more than a quarter of a century." Stanford admitted on cross-examination that the "men of note in encyclopedic compilation for more than a quarter of a century" were all contributors to the early editions alone, and that, apart from himself, none had written any articles for the New Standard Encyclopedia (R. 446–451).

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pedia, but who had made no contribution to respondents' work after Aiton's publication was discontinued under that name in 1912 [53] (R. 260–266). As a consequence of the number of revisions and alterations between 1912 and 1929 it seems clear (1) that some of the material originally in Aiton's Encyclopedia remained in the new editions of the revised work, and (2) that some of it was completely eliminated.

The Commission's order did not prevent respondents from advertising that writers of material falling in the first of the above two classes were contributors to the later publication. If what contributors to Aiton's Encyclopedia wrote was taken over (even though revised to a certain extent), such persons *were* contributors to the later editions and representations as to them did not violate the Commission's order.

But conversely, if persons had contributed to Aiton's Encyclopedia but their work has been dropped completely in the subsequent revisions, the representation that they were contributors to the latter was false.

We submit, therefore, that the modification by the court below of paragraph seven of the Commission's order was (1) unnecessary, if its purpose was to permit use of the names of contributors

[53] The Record does not show whether these writers' work was carried over, but a fair inference at least in one case is that it was not. See the testimony of Professor West (R. 265).

to Aiton's Encyclopedia whose work was taken over, and (2) unjustifiable, if its purpose and effect was to permit false representations to be made as to contributors whose work had been entirely eliminated. In either view, the decree of the court below modifying the order of the Commission should be reversed and the original order affirmed.

V

The Court Below Erred in Reversing the Eighth Clause of the Commission's Order

Paragraph eight of the Commission's order directed the respondents to cease and desist from (R. 79):

> (8) Advertising or representing that any person has given testimonials or recommendations for and concerning respondents' publications, when such is not the fact.

The court below reversed this provision of the order because it could "find no support in the evidence" for it (R. 490–491).

The testimony as to the use of false testimonials or recommendations falls into four classes:

(a) There was evidence that respondents' salesmen often stated to customers that the reference work had been recommended or approved or purchased by other persons in the vicinity, when such was not the case (R. 133, 188, 198, 269, 277, 372–373, 97–98; Ex. 44).

(b) There was evidence that respondents had transformed testimonials given for earlier editions of the Standard Reference Work into testimonials

for the New Standard Encyclopedia without the authorization of the persons giving the testimonials (Fdg. 15, R. 73–74; compare the testimonials in Resp. Ex. 2 with those in Resp. Ex. 6). The respondent Stanford admitted that this had been done (R. 466–467). Inasmuch as the work was "thoroughly revised" every two or three years (R. 387–388), persons who approved the earlier editions of the Standard Reference Work could not truthfully be said to have approved a newer encyclopedia, under a different name, which they had not seen.

(c) There was evidence that respondents used testimonials for the later publication which had been given only for Aiton's Encyclopedia in 1911 or older editions of the Standard Reference Work (R. 218–220), and that respondents had combined passages from an old testimonial with additional language written by themselves, put the whole on what purported to be the genuine letterhead of the person giving the testimonial, and forged his signature (R. 220–221; Exs. 56, 56A, 60, 61).

(d) Finally, there was the evidence of the witness referred to by the court below, Miss Grace Nixon, secretary to the present State librarian of Indiana, and secretary to the former librarian, Mr. Demarchus C. Brown, before his death. On the sales blanks distributed by respondents was a testimonial purporting to come from Mr. Brown (*e. g.*, Exs. 11, 78). From the evidence of Miss

Nixon,[54] the Commission could have inferred either that the testimonial was genuine or that it was a fabrication. When conflicting inferences can be drawn from evidence, the Commission is entitled to decide which inference is the most credible. The testimony adduced as to the admitted fabrication of another testimonial (R. 220; see page 80, *supra*) indicates that it was not unreasonable to infer from Miss Nixon's testimony that the letter was a fabrication.

On the basis of *all* of the evidence reviewed above, and not merely the testimony of Miss Nixon, the Commission found that—

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[54] Miss Nixon testified that a salesman had left a copy of the Standard Reference Work with Mr. Brown; that Mr. Brown examined it and "decided he did not want it, and returned it;" that it was Mr. Brown's "very strict policy" never to recommend works for publishers; that she, as Mr. Brown's secretary, had never written a letter recommending respondent's publication; and that at one time she and Mr. Brown had searched through his files to discover if such a letter had been written, and were able to find none (R. 235–239).

Counsel for respondents then introduced in evidence a letter (Resp. Ex. 1), on the letterhead of the Indiana State Library, purporting to be written by hand by Mr. Brown, and asked the witness if the handwriting was that of Mr. Brown (R. 237–238). The witness admitted that it looked like Mr. Brown's writing, but stated that she "would not swear" it was his writing. The final question and answer in the colloquy on this point was as follows:

> Q. It would be your best judgment that it probably was his writing?
>
> A. No; I would not say that. I say it looks like Mr. Brown's writing.

> Many of these alleged testimonials are garbled, unauthorized, and have been made, when made at all, to cover a previous work, Aiton's Encyclopedia, which was a work quite different in form, in material, and in purpose from the Standard Reference Work. These same testimonials have been used year after year from 1912 to 1930 as expressions of opinion of eminent men as to the Standard Reference Work. [Fdg. 14, R. 72–73.]

The Commission further found that—

> None of these men or this woman ever wrote any testimonial or recommendation of or concerning the New Standard Encyclopedia. The representations that these men and this woman wrote the recommendations for the so-called "New Standard Encyclopedia" are false, deceptive, and misleading. [Fdg. 15, R. 74.]

The court below came to the conclusion that the testimony of Miss Nixon was "outweighed" by her identification of Mr. Brown's handwriting (R. 491). In weighing this evidence, it clearly went beyond its proper function. And in ignoring the other evidence adduced, the court refused to follow the mandate of the statute that the findings of the Commission "if supported by testimony, shall be conclusive." Federal Trade Commission Act, Sec. 5; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73.

CONCLUSION

It is respectfully submitted that the judgment of the court below, to the extent that it modifies the order of the Federal Trade Commission, should be reversed, and the order of the Commission affirmed.

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SEPTEMBER, 1937.

APPENDIX

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717, 719, U. S. C., Title 15, Sec. 45) is as follows:

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> *Power to prohibit.*—The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> *Procedure by commission.*—Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may

be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

Enforcement of orders.—If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the pro-

ceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Application to set aside order.—Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and

thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

Jurisdiction of court.—The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 14

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD EDUCATION SOCIETY ET AL.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

HENRY WARD BEER,
Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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